

Letter of Findings: 04-20170738P
Indiana Sales/Use Tax
For the Years 2013, 2014, and 2015

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document to the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Negligence penalty was properly assessed as a result of a sales and use tax audit because Contractor has a responsibility to ensure it is collecting and remitting sales and use tax properly.

ISSUE

I. Tax Administration - Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; IC § 6-8.1-5-1; Dep't of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 15-11-2](#)

Taxpayer requests that the Department abate the negligence penalty.

STATEMENT OF FACTS

Taxpayer is doing business in Indiana. The Indiana Department of Revenue ("Department") audited Taxpayer concerning sales and use tax for tax years 2013 through 2015. As a result, Taxpayer was assessed with additional sales tax, use tax, and negligence penalty.

Taxpayer paid an amount equal to the base tax liability and interest but not the associated penalty. Taxpayer protested the penalty and requested that the Department abate the negligence penalty. An administrative hearing was held and this Letter of Findings results. Additional facts will be provided as necessary.

I. Tax Administration - Negligence Penalty.

DISCUSSION

The Department imposed a ten percent negligence penalty because "[d]uring this audit period the [T]axpayer purchased exempt of Indiana sales tax construction equipment and three dump trucks. They made exempt sales of dirt and stone to customers from whom they had not received an exemption certificate." Taxpayer argues that though there was confusion in regards to its liability, Taxpayer believes that it acted reasonably and requests that the penalty be abated.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid, and each taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). In reviewing a taxpayer's argument, the Indiana Supreme Court has held that when it examines a statute that an agency is "charged with enforcing . . . we defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party." Dep't of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014).

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department[.]

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2](#)(c), as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

As the result of an audit, the Department assessed Taxpayer additional sales and use tax for tax years 2013 through 2015. The Department levied a ten percent negligence penalty in addition to the sales and use tax assessments. Taxpayer paid an amount equal to the base tax assessment and interest but not the associated penalty. Taxpayer argues that the penalty should be abated as Taxpayer acted reasonably.

Taxpayer "is a general construction contractor specializing in excavation and silt removal." During the audit, the Department found that "[T]axpayer sold exempt of Indiana sales tax various types of construction aggregates. The [T]axpayer billed the customers with sales tax being collected on the haul fees associated with the delivery of the aggregate but did not collect sales tax on the sales price of the aggregate." Taxpayer claims that "the business paid for the stone purchase and then were reimbursed for by the customer with this noted on the invoice." Taxpayer believes that the "[S]tate received every cent originally due and the business should have put [information] on the invoice differently that would have solved the problem." Taxpayer "request[s] abatement for reasonable cause [as] they believed the [S]tate was fully paid."

The audit also noted that "[T]axpayer [] sold loads of dirt exempt of Indiana sales tax. The [T]axpayer contends that they received the dirt for free and was only charging the customer to load and haul the dirt." The audit determined that the sale of dirt was subject to Indiana sales tax and noted that "the [T]axpayer was [previously] issued a notice of non-compliance and given a period of thirty-one days to obtain special exemption certificates

from their dirt sale customers." These exemption certificates were never obtained. During the hearing, Taxpayer stated that this has been corrected going forward.

Finally, the audit found that Taxpayer purchased several pieces of equipment, supplies and capital assets exempt of tax. The audit determined that these purchases were indeed subject to Indiana sales tax and assessed additional Indiana use tax on the purchases. Taxpayer claims that it "assumed all tax was paid at the business when buying equipment and did not understand that use tax was paid on the Sales tax form." Further, Taxpayer states that it believed it acted reasonably. Taxpayer did not believe it was responsible for paying sales tax on these items and requests abatement "for reasonable cause in relying on the equipment dealer and individual in paying taxes."

In applying the negligence penalty, the audit noted that "[d]uring this audit period the [T]axpayer purchased exempt of Indiana sales tax construction equipment and three dump trucks. They made exempt sales of dirt and stone to customers from whom they had not received an exemption certificate." Therefore, the audit determined "[T]axpayer was negligent in their duties as an agent of the Indiana Department of Revenue[.]" and should be subject to the negligence penalty. Taxpayer claims it was confused and believed it acted reasonably. Taxpayer merely "assumed" that sales tax was paid when it purchased certain equipment. Confusion and assumption are not acceptable arguments against the negligence penalty, especially when Taxpayer was previously put on notice that it needed to obtain its customer's exemption certificates. Therefore, the negligence penalty is justified.

FINDING

Taxpayer's protest is denied.

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